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2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2015

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9 ARGUED: AUGUST 26, 2015
10 DECIDED: NOVEMBER 10, 2015
11 CORRECTED: NOVEMBER 12, 2015
12

13 No. 14-1513

14
15 DAVID MARTINEZ,
16 *Petitioner-Appellant,*

17
18 *v.*

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20 SUPERINTENDENT OF EASTERN CORRECTIONAL FACILITY,
21 *Respondent-Appellee.*¹
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24 Appeal from the United States District Court
25 for the Eastern District of New York.
26 No. 11 Civ. 4330 – Nina Gershon, *Judge.*
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28
29 Before: WALKER, JACOBS, and LIVINGSTON, *Circuit Judges.*
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¹ The Clerk of the Court is directed to amend the caption as set forth above.

RANDOLPH Z. VOLKELL, Law Office of Randolph
Z. Volkell, Merrick, NY, *for Petitioner-Appellant.*

DONALD J. BERK, Assistant District Attorney,
Nassau County (Madeline Singas, District
Attorney, Nassau County, Tammy J. Smiley,
Assistant District Attorney, *on the brief*), Mineola,
NY, *for Respondent-Appellee*.

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2 JOHN M. WALKER, JR., *Circuit Judge*:

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Petitioner-appellant David Martinez appeals from the decision of the United States District Court for the Eastern District of New York (Gershon, J.), denying his petition for a writ of habeas corpus. Although Martinez seeks to challenge his 2007 New York state conviction for charges including murder in the second degree, he failed to file his petition within the one-year limitations period provided by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)(1) (2015) (“AEDPA”). The district court held that Martinez was not entitled to equitable tolling of the statute of limitations because he had not acted with reasonable diligence during the period for which he sought tolling. We conclude that the court’s analysis of Martinez’s degree of diligence was premised upon a misapplication of our decision in *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004). Accordingly, we VACATE the district court’s order dismissing the petition and REMAND the case for further proceedings consistent with this opinion.

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BACKGROUND

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On July 20, 2007, David Martinez entered a guilty plea in New York state court to charges including attempted murder, robbery, and assault. On February 11, 2008, he was sentenced to twelve years’ imprisonment, five years’ post-release supervision, and

1 restitution. He was then transferred to the custody of the New York
2 State Department of Corrections and Community Supervision.
3 Martinez immediately hired an attorney to seek post-conviction
4 relief, but this attorney evidently showed a greater interest in
5 collecting fee payments than in providing Martinez with adequate
6 representation. The attorney missed the habeas petition deadline
7 and was barely responsive to Martinez's case, as the following facts
8 demonstrate.

9 On March 3, 2008, three weeks after his sentencing, Martinez
10 and his mother hired attorney Anthony Denaro to handle his post-
11 conviction relief. Denaro, Martinez, and Martinez's mother
12 executed an agreement for legal services. They agreed upon a
13 retainer payment of \$5,000, and Martinez's mother paid \$2,000 that
14 day. Denaro accepted the money and then did virtually nothing for
15 almost a year. Between March 2008 and January 2009, the only
16 communication that Martinez received from Denaro was a
17 November 28, 2008 billing statement.

18 Denaro claims his firm sent Martinez two letters in early 2009,
19 more than ten months after Martinez hired him: a letter from Denaro
20 on January 28, 2009, enclosing all court documents in his possession,
21 and a letter from Denaro's colleague, Jack Evans, on February 12,
22 2009, requesting a detailed statement of the facts and circumstances
23 in his case. Denaro also claims he received a letter on March 3, 2009

1 from Martinez, answering Evans' request. None of these letters are
2 in the record, however, and Martinez claims Denaro sent him
3 "nothing" until March 4, 2009.

4 On March 4, 2009, more than a year after Denaro's retention,
5 Evans sent Martinez a letter requesting information to be used in the
6 filing of a *coram nobis* petition. The letter referenced documents and
7 information previously provided by Martinez. At no point in this
8 letter did Evans mention that, because Martinez's judgment became
9 final on March 12, 2008, the one-year deadline for filing a petition for
10 habeas corpus would expire in just over a week. On March 6, 2009,
11 Denaro's firm also sent Martinez a second billing statement.

12 From March to April of 2009, Martinez and Evans discussed
13 the *coram nobis* petition. On March 16, 2009, Martinez responded to
14 Evans. On April 2, 2009, Evans met with Martinez's mother. The
15 following day, the firm sent Martinez a third billing statement. On
16 April 6, 2009, Evans sent Martinez a letter describing the possible
17 results of a *coram nobis* petition. On April 12, 2009, Denaro met with
18 Martinez's mother and advised her that it would be very difficult to
19 formulate a meritorious petition. On April 30, 2009, Evans wrote
20 Martinez to tell him that he was leaving Denaro's firm. That letter
21 referenced "the two most recent letters you sent to me regarding
22 your case."

1 After Evans left, Martinez corresponded with Denaro. On
2 June 18, 2009, Martinez wrote to Denaro. On June 25, 2009, Denaro
3 wrote back and assured Martinez that he was in the process of
4 “determining whether appeal should be taken to the federal court.”
5 Denaro emphasized his “forty-five years [of] legal experience” and
6 claimed a record of “favorable results.” On October 16, 2009,
7 Martinez wrote again to Denaro. On November 13, 2009, nearly five
8 months after his last communication and more than eight months
9 since the passing of the habeas deadline, Denaro responded to
10 “provide [Martinez] with the status of [his] motion to withdraw [his]
11 guilty plea and federal habeas corpus relief.” Denaro stated, “Please
12 be assured that we are working very hard to make this happen for
13 you.” On November 25, 2009, Martinez wrote again to Denaro.
14 Denaro’s next and last communication to Martinez, sent on January
15 15, 2010, was a fourth billing statement.

16 On August 3, 2010, Martinez filed *pro se* for a writ of error
17 *coram nobis*, challenging multiple aspects of his sentence. On
18 December 8, 2010, the New York Supreme Court modified the
19 restitution amount but denied all other claims. *People v. Martinez*,
20 Ind. No. 889N-07, Motion No. C-680 (Sup. Ct. Nassau County, Dec.
21 8, 2010) (Ayres, J.). On May 10, 2011, the Appellate Division, Second
22 Department (Lott, J.), denied Martinez leave to appeal the denial.

1 On August 1, 2011, his application for leave to appeal to the New
2 York Court of Appeals was denied.

3 On September 27, 2010, while waiting for a decision on his
4 *coram nobis* petition, Martinez complained about Denaro's conduct
5 to the Second Department Grievance Committee, Tenth Judicial
6 District ("Grievance Committee"). On December 21, 2010 and
7 August 9, 2011, he submitted additional letters to the Grievance
8 Committee. He also reached out to The Lawyers' Fund for Client
9 Protection but was informed on October 7, 2010 that the
10 organization would be unable to help him. On November 18, 2011,
11 the Grievance Committee determined that Denaro had breached the
12 Rules of Professional Conduct and admonished him for his failure to
13 timely pursue Martinez's case.

14 On August 30, 2011, Martinez filed *pro se* for a writ of habeas
15 corpus in the United States District Court for the Eastern District of
16 New York. He sought a reduction of his sentence to ten years'
17 imprisonment and either reduction or elimination of post-release
18 supervision. His petition alleged, *inter alia*, ineffective assistance of
19 counsel. The district court (Feuerstein, J.) issued an Order to Show
20 Cause, directing Martinez to explain why his petition should not be
21 dismissed as time-barred.

22 On April 15, 2014, after reviewing submissions from both
23 parties, the district court dismissed the petition as time-barred. The

1 district court concluded that the one-year habeas limitations period
2 began when Martinez's judgment became final on March 12, 2008,
3 and that his petition was therefore time-barred as of March 12, 2009.
4 The district court found Martinez ineligible for equitable tolling
5 because, although Denaro's effective abandonment of Martinez
6 constituted an extraordinary circumstance preventing him from
7 timely filing his petition, Martinez had not acted with the required
8 reasonable diligence. On July 31, 2014, we granted a certificate of
9 appealability on the question of whether Martinez was entitled to
10 equitable tolling.

11 DISCUSSION

12 We review *de novo* a district court's denial of equitable tolling
13 when premised on a finding that "governing legal standards would
14 not permit equitable tolling in the circumstances." *Belot v. Burge*, 490
15 F.3d 201, 206 (2d Cir. 2007); see *Dillon v. Conway*, 642 F.3d 358, 363
16 (2d Cir. 2011) (per curiam).

17 The district court dismissed Martinez's petition as untimely
18 under AEDPA. That act places a one-year limitation on a prisoner's
19 right to seek federal review of a state criminal conviction pursuant
20 to 28 U.S.C. § 2254. *Smith v. McGinnis*, 208 F.3d 13, 15 (2d Cir. 2000)
21 (per curiam). The statute of limitations "runs from the latest of a
22 number of triggering events, including the date on which the
23 judgment became final by the conclusion of direct review or the

1 expiration of the time for seeking such review.” *Rivas v. Fischer*, 687
2 F.3d 514, 533 (2d Cir. 2012) (internal quotation marks omitted).
3 AEDPA’s time constraint “promotes judicial efficiency and
4 conservation of judicial resources” and “safeguards the accuracy of
5 state court judgments by requiring resolution of constitutional
6 questions while the record is fresh.” *Acosta v. Artuz*, 221 F.3d 117,
7 123 (2d Cir. 2000).

8 A petitioner may secure equitable tolling of the limitations
9 period in certain “rare and exceptional circumstance[s].” *Smith*, 208
10 F.3d at 17 (internal quotation marks omitted); see *Holland v. Florida*,
11 560 U.S. 631, 649 (2010). The petitioner must establish that (a)
12 “extraordinary circumstances” prevented him from filing a timely
13 petition, and (b) he acted with “reasonable diligence” during the
14 period for which he now seeks tolling. *Smith*, 208 F.3d at 17.
15 Attorney error generally does not rise to the level of an
16 “extraordinary circumstance.” *Baldayaque v. United States*, 338 F.3d
17 145, 152 (2d Cir. 2003). However, attorney negligence may
18 constitute an extraordinary circumstance when it is “so egregious as
19 to amount to an effective abandonment of the attorney-client
20 relationship.” *Rivas*, 687 F.3d at 538.

21 Here, we agree with the district court that an extraordinary
22 circumstance impeded Martinez’s timely filing because Denaro
23 “effectively abandoned” his client. The focus of this appeal,

1 however, is on the district court's holding, based upon our decision
2 in *Doe v. Menefee*, 391 F.3d 147 (2d Cir. 2004), that Martinez was
3 ineligible for equitable tolling because he had not acted with
4 "reasonable diligence."

5 As we explain below, in assessing whether Martinez's level of
6 diligence rendered him ineligible for equitable tolling, the district
7 court premised its conclusions on a misapplication of *Doe*. The
8 district court specifically should have (a) considered the effect of
9 Denaro's misleading conduct on Martinez's ability to evaluate his
10 lawyer's performance, (b) inquired further into Martinez's financial
11 and logistical ability to secure alternative legal representation, (c)
12 inquired further into Martinez's ability to comprehend legal
13 materials and file his own petition, and (d) tailored its "reasonable
14 diligence" analysis to the circumstances of a counseled litigant.

15 I. The *Doe* Factors

16 To qualify for equitable tolling, a petitioner must "act as
17 diligently as reasonably could have been expected *under the*
18 *circumstances*." *Baldayaque*, 338 F.3d at 153 (emphasis in original). *Doe*
19 designated four factors relevant to a diligence inquiry "in the
20 attorney incompetence context": (1) "the purpose for which the
21 petitioner retained the lawyer," (2) "his ability to evaluate the
22 lawyer's performance," (3) "his financial and logistical ability to
23 consult other lawyers or obtain new representation," and (4) "his

1 ability to comprehend legal materials and file the petition on his
2 own.” *Doe*, 391 F.3d at 175.

3 The first *Doe* factor, as the district court acknowledged,
4 supports a finding in favor of Martinez. Martinez hired Denaro to
5 handle all his post-conviction relief, including a potential federal
6 habeas petition. The timely filing of that petition thus fit squarely
7 within Martinez’s reasonable expectations.

8 The second *Doe* factor, contrary to the district court
9 conclusion, also supports a finding in favor of Martinez. Martinez’s
10 ability to evaluate his lawyer’s performance was compromised by
11 Denaro’s active concealment of his firm’s poor performance. The
12 firm sent numerous billing statements and requests for information,
13 implying ongoing work. Letters from the firm also consistently
14 contained reassuring language. A May 4, 2009 letter, for example,
15 promised the firm would “do what we can to help you.” An April
16 30, 2009 letter said the firm was “mak[ing] every effort to assist
17 you.” A June 25, 2009 letter stated that Denaro had “thoroughly
18 investigated and researched the appeal issues” and could bring to
19 bear “forty-five years [of] legal experience” and a “record [of]
20 favorable results” on Martinez’s behalf. A November 13, 2009 letter
21 said that the firm was “working very hard to make this happen for
22 you.” Although Denaro often left Martinez waiting for months for
23 updates on the case, the evident tendency of Denaro’s

1 correspondence would have been to lull Martinez into believing that
2 the firm was hard at work during periods of non-communication.

3 The district court found that “[t]here is no reason to believe
4 that Mr. Martinez could not evaluate Mr. Denaro’s performance”
5 because Martinez was able to critically analyze the lawyer’s work in
6 complaints filed years later. However, the district court should have
7 considered whether Denaro’s written misrepresentations reasonably
8 could have impeded and delayed Martinez’s ability to evaluate his
9 lawyer’s performance at the time that it mattered and without the
10 benefit of hindsight.

11 With respect to the third *Doe* factor, the record contains no
12 clear indication that Martinez had the financial ability to easily
13 obtain another lawyer, even if he had realized that his counsel had
14 abandoned him. In addition, his incarceration would have created
15 logistical obstacles. The district court asserted without further
16 elaboration that Martinez “could have hired a new attorney,” but we
17 do not see how this capability has been established on the record.
18 We agree with Martinez’s contention that the matter warranted
19 further inquiry by the district court.

20 As for the fourth *Doe* factor, the record shows that Martinez
21 had no legal expertise or training. Although defendants without
22 legal training often file *pro se* petitions, there is no showing that
23 Martinez has any special ability to comprehend legal materials. To

1 be sure, Martinez ultimately was able to make several *pro se* filings,
2 but we have previously noted that “[t]he fact that [a petitioner] was
3 *eventually* able to draft a petition . . . does not mean that a duly
4 diligent person would have done so sooner.” *Nickels v. Conway*, 480
5 F. App’x 54, 58 (2d Cir. 2012) (summary order) (emphasis in
6 original). The district court asserted that Martinez “could have . . .
7 drafted the petition himself with the assistance of the prison’s
8 resources.” Yet, again, this capability—and more specifically that it
9 would have yielded a timely filing—was not clearly established on
10 the record, given Martinez’s reliance on retained counsel. So we
11 agree with Martinez’s contention that this matter also warranted
12 further inquiry.

13 II. Reasonable Diligence and the Counseled Litigant

14 When analyzing the applicable *Doe* factors, the district court
15 emphasized the fact that, between the date that Martinez hired
16 Denaro and the date that the limitations period expired, “the record
17 is devoid of evidence indicating that Mr. Martinez inquired about a
18 potential federal habeas corpus petition.” We cannot agree,
19 however, with the suggestion that Martinez would have had to
20 specifically ask his attorney about filing a habeas petition, or
21 undertaking any other specific initiative (as opposed to the general
22 pursuit of post-conviction relief), in order to satisfy the “reasonable
23 diligence” standard. Although we have previously found

1 reasonable diligence when attorneys ignored their clients' express
2 instructions to file habeas petitions, *see Nickels*, 480 F. App'x at 57-59;
3 *Dillon*, 642 F.3d at 363, plainly no one is born with an understanding
4 of habeas corpus and its deadlines. While we expect a litigant
5 proceeding *pro se* to educate himself regarding the various methods
6 of appealing a conviction, we also recognize that a litigant
7 proceeding with counsel may reasonably trust his attorney to know
8 the deadlines without client-provided research assistance.²

9 The district court placed particular weight upon our statement
10 in *Doe* that "it would be inequitable to require less diligence from
11 petitioners who are able to hire attorneys than from those who are
12 forced to proceed *pro se*." *Doe*, 391 F.3d at 175. It is important to
13 clarify that statement. Although we do not require less diligence
14 from counseled litigants, it should be recognized that a counseled
15 litigant may display the same level of diligence in a different way. A
16 litigant with an attorney, for example, may reasonably delegate
17 certain tasks and decisions to the attorney. The litigant may then
18 reasonably rely upon the attorney to do the necessary work, if, as

² Ordinarily, of course, a litigant who relies on his attorney bears the risk of his agent's negligence (with respect to missed deadlines and otherwise). *See Lawrence v. Florida*, 549 U.S. 327, 336 (2007). However, when an attorney actually impedes timely filing in circumstances (such as abandonment) that are extraordinary, the petitioner's reasonable reliance on counsel is relevant to his reasonable diligence for the purposes of equitable tolling.

1 here, the attorney leads the client to believe that he is fully engaged
2 in the matter.

3 We stated in *Doe* that “the act of retaining an attorney does
4 not absolve the petitioner of his responsibility for overseeing the
5 attorney’s conduct or the preparation of the petition,” *id.*, and we
6 still endorse that statement. Martinez, however, not only swiftly
7 secured representation but also made efforts to reach out to Denaro
8 and ensure that the attorney was diligently pursuing post-conviction
9 relief. Martinez repeatedly wrote to Denaro to inquire about his
10 case and responded promptly each time his attorney asked for
11 information. Eight months after receiving his last communication
12 from Denaro, which itself was ten months after the habeas corpus
13 deadline had passed, Martinez filed a writ of error *coram nobis pro se*
14 in August 2010 and wrote letters to the Grievance Committee in
15 September 2010, December 2010, and August 2011. The district
16 court stated that, because the Grievance Committee letters were sent
17 after the habeas deadline had passed, “that evidence is not relevant
18 to the court’s equitable tolling analysis.” However, given that
19 Martinez seeks tolling for the entire period between when his
20 judgment became final and when he ultimately filed his habeas
21 petition *pro se*, his actions after the deadline passed remain relevant
22 to the tolling analysis. These letters, as well as Martinez’s efforts to

1 communicate with his attorney and his *pro se* filings, all indicate
2 diligence.

3 To be sure, significant gaps in the record also indicate that
4 Martinez may have been inactive for portions of the time for which
5 he now seeks tolling. However, Martinez must be given the
6 opportunity to explain his activity level during these time periods.
7 Whether the gaps truly indicate inactivity, and whether such
8 inactivity overcomes the acts of diligence that Martinez did exhibit,
9 will be matters for the district court to examine on remand.

10 Viewing the record in the context of Denaro's extraordinary
11 misconduct, we conclude that there are significant indications that
12 Martinez acted with reasonable diligence and that these indications
13 justified a more detailed inquiry and findings by the district court.
14 In light of these findings and in light of our clarification of *Doe*, we
15 remand this matter to the district court for a hearing on the issue of
16 diligence.

17

18 CONCLUSION

19 For the reasons stated above, we VACATE the district court's
20 order dismissing the petition and REMAND for further proceedings
21 consistent with this opinion.